

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DEPARTMENT OF THE NAVY
UNITED STATES OF AMERICA
U.S.S. O'CALLAHAN (FF 1051)

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY

Respondent.

PCHB No. 79-197

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal from the issuance of a \$250 civil penalty for the alleged violation of section 9.03 of respondent's Regulation I, came before the Pollution Control Hearings Board, Nat W. Washington, Chairman, and David Akana (presiding) at an informal hearing on July 21, 1980, in Lacey, Washington.

Respondent was represented by its attorney, Keith D. McGoffin; appellant was represented by its attorney, Timothy L. Leachman.

1 Olympia court reporter Kim Otis recorded the proceeding.

2 FINDINGS OF FACT

3 I

4 On October 8, 1979, at about 3:53 p.m. while on routine patrol,
5 respondent's inspector saw a black plume coming from the neighborhood
6 of Pier 70 in Seattle. The inspector positioned himself, observed the
7 plume, and recorded a density reading of Ringlemann 3 1/2 for nine
8 consecutive minutes. After making the observation, the inspector
9 boarded the source of the emission, the U.S.S. O'Callahan, and asked
10 the person at the boarding ramp to see the chief engineer or
11 commanding officer of the vessel. The chief engineer met the
12 inspector, then returned to the interior of the vessel. Thereafter,
13 the smoke stopped. The chief engineer re-emerged with the commanding
14 officer. The source of the emission was said to be from the auxiliary
15 boiler. The inspector issued a notice of violation for the alleged
16 violation of section 9.03(b)(1) of respondent's Regulation I from
17 which followed a \$250 civil penalty and this appeal.

18 II

19 Pursuant to RCW 43.219.260, respondent has filed a certified copy
20 of its Regulation I and amendments thereto which are noticed.

21 Section 9.03(b)(1) makes it unlawful for any person to cause or
22 allow the emission of any air contaminant for more than three minutes
23 in any one hour which is darker in shade than that designated as No. 1
24 on the Ringlemann Chart as published by the United States Bureau of
25 Mines.

26 Section 3.29 provides for a civil penalty of up to \$250 per day
27

1 for each violation of Regulation I.

2 III

3 Any Conclusions of Law which should be deemed a Finding of Fact is
4 hereby adopted as such.

5 From these Findings the Board comes to these

6 CONCLUSIONS OF LAW

7 I

8 Appellant violated section 9.04(b) (1) of Regulation I on
9 October 8, 1979, as alleged. The imposition of a \$250 civil penalty
10 was proper and is reasonable in amount.

11 II

12 Appellant contends that section 9.03(b) has no effect as a result
13 of Puget Sound Air Pollution Control Agency v. Kaiser Aluminum and
14 Chemical Corporation, 25 Wn. App. 273 (1980), which held that the
15 strict liability standard of the section, as it was administered, was
16 unenforceable as an attempt to promulgate an administrative rule in
17 excess of the agency's powers. Id. at p.281. The regulation may
18 nonetheless be enforced where it is limited, expressly or impliedly,
19 to those who "knowingly" violate its provisions. Id. The Court's
20 opinion does not go as far as appellant contends. The opinion does
21 require that "knowingly" be shown as an element of a prima facie
22 civil penalty case and various provisions of "knowledge" are quoted by
23 the court from the criminal code of 1975, which was enacted subsequent
24 to the applicable Clean Air Act provision and regulations:

25 Knowledge. A person knows or acts knowingly
or with knowledge when:

(1) he is aware of a fact, facts, or
circumstances or result described by a statute
27 defining an offense; or

(11) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010(1)(b).

We conclude that to the extent that "knowledge" is required, such knowledge occurs when the actor has information which would lead a reasonable man in the same situation to believe that certain facts exist. In this matter, the U.S.S. O'Callahan was emitting a black smoke plume during the period beginning with the inspector's first notice of it up to the time of the boarding of the vessel and subsequent termination of the smoke. The elapsed time exceeded a quarter-hour. It is reasonable to presume that at least the one Navy personnel on duty monitoring the gangplank should have noticed the plume. Accordingly, we conclude that appellant "knowingly" violated section 9.03(b)(1) of Regulation I.

III

The \$250 civil penalty should be affirmed.

IV

Any Findings of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER


ORDER

The \$250 civil penalty is affirmed.

DONE at Lacey, Washington, this 29th day of July, 1980.

POLLUTION CONTROL HEARINGS BOARD


NAT W. WASHINGTON, Chairman


DAVID AKANA, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER